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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

WANDA MAE BINGHAM,

Petitioner,

v.

INLAND DIVISION OF GENERAL MOTORS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the District Court err in granting the defendant's motion to quash service of process when the designation in the complaint sufficiently identified the proper defendant and timely service was made on the proper defendant's designated agent for service of process?

II. Did the District Court properly interpret and apply Fed. R. Civ. P. 15(c) and *Schiavone v. Fortune*, 477 U.S. 21, 100 S.Ct. 2379 (1986) in denying the plaintiff's motion to amend the complaint where the proposed amendment merely sought to correct a misnomer and did not add a new cause of action or party defendant?

III. Should state law concerning the tolling of the statute of limitations and service of process be applied by a District Court in determining whether a proposed amended complaint would relate back to the date of the original complaint, which was initially filed by the plaintiff in state court then removed to federal court by the defendant?

IV. Do the 1991 amendments to Fed. R. Civ. P. 15(c) apply retroactively to a case pending on appeal when the amendments took effect and where the lower court judge expressly stated that the amendments would produce a more fair result?

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JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 31, 1991. A petition for rehearing was denied on December 4, 1991. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fed. R. Civ. P. 1

> Scope of Rules. These rules govern the procedure in the United States District courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 8(f)

> Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Fed. R. Civ. P. 15(c) (before 1991 amendments).

> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by

amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Fed. R. Civ. P. 15(c) (after 1991 amendments)

Relation Back Of Amendments. An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning

> the identity of the proper party, the action would have been brought against the party.
>
> The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Ohio R. Civ. P. 3(A)

> Commencement. A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Rule 15 (C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Rule 15(D).

STATEMENT OF THE CASE

Petitioner, Wanda Mae Bingham, was employed as a production worker at General Motors' Inland Division plant in Dayton, Ohio. On July 1, 1986, Petitioner was working with a robot produced by GM Fanuc Robotics Corporation ("Fanuc") when the robot caused a rejected hydraulic motor mount to slide down a chute with such velocity that it passed over the top of the rejection bin and struck Petitioner on the left foot, causing severe and permanent injuries. On at least two occasions prior to

July 1, 1986, Petitioner notified her supervisors that the robot was throwing rejected hydraulic motor mounts onto the floor and that such defect was unreasonably dangerous and substantially certain to result in injury.

On June 30, 1988, Petitioner filed a complaint in the Court of Common Pleas of Montgomery County, Ohio alleging negligence, intentional tort, and product liability claims. The complaint named as Defendants "The Inland Division of General Motors, Agent CT Corp. System" and "GM Fanuc Robotics Corporation." Service was perfected upon General Motors' agent on July 8, 1988, and upon Fanuc on July 14, 1988. On August 15, 1988, Fanuc filed its answer to the complaint. Defendant-Respondent, Inland Division of General Motors, made a special appearance and filed a petition for removal on the basis of diversity of citizenship to the United States District Court for the Southern District of Ohio, Western Division, on September 23, 1988. Fanuc was thereafter dismissed as a defendant upon motion of Petitioner.

Following removal, Respondent, through a special appearance, filed a motion to quash service of process on the basis that the Inland Division is a wholly-owned operating division of General Motors and had no independent legal status. The District Court conditionally sustained the motion to quash (Appendix B) and subsequently made that decision absolute, dismissing Inland Division as a defendant by Order of August 11, 1989 (Appendix C).

On August 28, 1989, Petitioner moved for leave to amend the complaint to correct the misnomer in the caption and assert General Motors Corporation as the

proper designation for the Defendant. In support of this motion, Petitioner filed several memoranda and included an affidavit of counsel indicating that he had dealt with the Inland Division on numerous occasions and had always seen it designated as "Inland Division of General Motors" and never merely as "General Motors." Defendant moved to strike the affidavit on December 14, 1989.

On March 6, 1990, Petitioner filed a motion to quash removal arguing that the District Court lacked subject matter jurisdiction. Petitioner requested that the cause be remanded to the Court of Common Pleas of Montgomery County, Ohio for determination upon the merits.

In an Entry dated December 14, 1990, the District Court overruled Petitioner's motion to amend the complaint, Respondent's motion to strike the affidavit, and Petitioner's motion to quash removal. The Entry further ordered that the cause be terminated (Appendix D).

Petitioner timely filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit on January 9, 1991. On October 31, 1991, the Sixth Circuit adopted the written opinions of the District Court Judge and summarily affirmed the judgment (Appendix A). Petitioner thereafter filed a petition for rehearing which was denied on December 4, 1991 (Appendix E). On December 20, 1991, Petitioner secured a stay of the mandate pending application to this Honorable Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

DID THE DISTRICT COURT ERR IN GRANTING THE DEFENDANT'S MOTION TO QUASH SERVICE OF PROCESS WHEN THE DESIGNATION IN THE COMPLAINT SUFFICIENTLY IDENTIFIED THE PROPER DEFENDANT AND TIMELY SERVICE WAS MADE ON THE PROPER DEFENDANT'S DESIGNATED AGENT FOR SERVICE OF PROCESS?

Rule 1 of the Federal Rules of Civil Procedure states that "[t]hese rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." In promoting this philosophy of liberal construction, this Court has stated that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 103 (1957). Despite this mandate, the District Court strictly construed the complaint and quashed service of process because Petitioner identified the defendant in the caption of the complaint as "The Inland Division of General Motors" rather than "General Motors Corporation." Such a strict construction flies in the face of the express purpose of the Civil Rules, particularly in light of the circumstances of this case. By granting the Writ, this Court can reaffirm the liberal pleading philosophy of the rules and prevent Respondent from taking unjust advantage of an otherwise inconsequential pleading error.

The underlying circumstances of this case particularly illustrate the harshness of a strict construction of the rules and demonstrate why the "sporting theory" of justice was abandoned long ago. The caption of the complaint identified the defendant as "The Inland Division of General Motors, Agent C.T. Corp. System." C.T. Corp. System is Respondent's designated statutory agent for service of process in Ohio and received service on July 8, 1988, just eight days after the complaint was filed. The body of the complaint further identified the defendant as follows:

> 1. The Defendant, Inland Division of General Motors ("Inland"), is a corporation organized under the laws of the State of Delaware, with a place of business located at 2701 Home Avenue, City of Dayton, County of Montgomery, and State of Ohio, doing business in the manufacture of parts for General Motors automobiles.

Respondent is admittedly a Delaware corporation and has a place of business in Dayton, Ohio. It is clear, therefore, that this is not a case of naming the wrong defendant, but of mislabeling the right one. Respondent's statutory agent received service of process, recognized that Respondent was the proper party, and duly forwarded the service to Respondent. Respondent realized that it was the proper defendant in this action, made a special appearance, and filed a petition for removal. In that petition, Respondent, identifying itself as "Inland Division of General Motors Corporation," stated in paragraph one (1) that it was a defendant in this action. If Respondent identifies itself in the same manner as the

case caption, how can it be said that the caption names a separate entity incapable of being sued?

The record further reveals that the mislabeling of Respondent was directly induced, at least in part, by the conduct of Respondent. In state administrative proceedings for workers' compensation, Respondent responded at all times as "Inland Division of General Motors" and impliedly represented that this appellation was proper. At any time during the administrative proceedings, Respondent could have informed Petitioner that its legally correct designation was "General Motors Corporation." Respondent's failure to do so reasonably induced Petitioner to continue identifying Respondent as "Inland Division of General Motors." Such action, or inaction, thus places at least some of the risk of misdesignation on Respondent and clearly warrants application of the doctrine of equitable estoppel, which has been cogently summarized as follows:

> Equitable estoppel in the modern sense arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law, unless prevented by estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel.

Bechtel v. Robinson, 886 F.2d 644, 650 (3rd Cir. 1989), quoting S. Symons, *Pomeroy's Equity Jurisprudence*, §802 (5th. Ed. 1941) (emphasis in original).

Not only should Respondent's silence or negative omission throughout the administrative proceedings estop its assertion of misidentification as a defense, but its conduct during the state and federal court proceedings should also negate such a defense. The action was commenced in state court with the filing of the complaint and timely service upon Respondent's statutory agent on July 8, 1988. On September 14, 1988, Respondent identifying itself as "the defendant, Inland Division of General Motors," moved the court for an extension of time to answer or otherwise plead. Subsequently, Respondent filed a petition for removal and again identified itself as "Inland Division of General Motors Corporation" and indicated that it was a defendant in this action. Under such circumstances, Respondent must be estopped from asserting the defense of insufficiency of process due to the alleged misidentification. Respondent cannot be rewarded for continuously and repeatedly misrepresenting or, at a minimum, acquiescing in the designation "Inland Division of General Motors."

It is important to keep in mind that this action was originally commenced in state court. Therefore, it is the law of Ohio which should govern the sufficiency of service. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S. Ct. 1978 (1980). Ohio law, too, recognizes estoppel under these circumstances.

> When the mistake as to the identity of the corporation which should be the proper party-defendant was caused or induced by the action

> of an officer or officers of the corporation which is the subject of a motion to substitute as a party defendant, we feel that such a mistake is the result of the representations of the agent or agents of such corporation, and that such corporation is thereby estopped to dispute the question of its correct identity.

Stauffer v. Isaly Dairy Co., 4 Ohio App. 2d 15, 27, 211 N.E. 2d 72, 80 (1965).

By quashing service of process, the District Court disregarded the foregoing state and federal authorities, and adopted the pleading approach expressly rejected by this Court in *Conley v. Gibson, supra*. The Court of Appeals sanctioned this departure from precedent by adopting the District Court's opinions and summarily affirming. By granting the Writ, this Court can rectify this injustice and reaffirm the intent of the Civil Rules.

II.

DID THE DISTRICT COURT AND COURT OF APPEALS PROPERLY INTERPRET AND APPLY FED. R. CIV. P. 15(c) AND *SCHIAVONE V. FORTUNE*, 477 U.S. 21, 100 S. Ct. 2379 (1986) IN DENYING THE PLAINTIFF'S MOTION TO AMEND THE COMPLAINT WHERE THE PROPOSED AMENDMENT MERELY SOUGHT TO CORRECT A MISNOMER AND DID NOT ADD A NEW CAUSE OF ACTION OR PARTY DEFENDANT?

When Respondent raised the issue of misnomer, Petitioner moved to amend the complaint to insert the designation "General Motors Corporation" in place of "Inland

Division of General Motors." The District Court, however, indicated that such an amendment would be futile because it would not relate back under Rule 15(c) as interpreted by *Schiavone v. Fortune*, 477 U.S. 21, 100 S. Ct. 2379 (1986), and would thus be time-barred under the applicable statute of limitations. The Court accordingly denied Petitioner's motion to amend despite the dictates of Rule 15(a) which provides that leave to amend a pleading "shall be freely given when justice so requires."

Since the rulings of the District Court and Court of Appeals, amendments to Rule 15(c) have gone into effect which were designed to remedy the harshness of this Court's decision in *Schiavone*. See Petitioner's Fourth Question Presented for Review, *infra*. From the time *Schiavone* was rendered, it drew widespread criticism as being unduly restrictive and inconsistent with the liberal pleading practice secured by Rule 8. See Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L. Rev. 720 (1988); Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S. Cal. L. Rev. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 86 Mich. L. Rev. 1507 (1987). By granting the Writ, this Court can reexamine the premise of *Schiavone* and its continued vitality in light of recent amendments to Rule 15(c).

At the time of the proceedings below, Rule 15(c) stated:

> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth

> in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. . . .

The District Court found that Petitioner's motion to amend was, in effect, a motion to change the party against whom the claim was asserted. As such, the Court concluded that the proposed amendment would not relate back to the original pleading because service was not completed on the party to be added, General Motors Corp., until after the statute of limitations had run. In so holding, the District Court relied heavily upon this Court's decision in *Schiavone v. Fortune, supra.* It is Petitioner's position that such reliance upon *Schiavone* was misplaced.

In *Schiavone,* the Plaintiff filed a libel action as a result of a magazine article and named as a Defendant "Fortune," without embellishment. Fortune, however, was only a trademark and the name of an internal division of Time, Incorporated, a New York corporation. The complaint was sent to Time's statutory agent in New York, but service was refused because Time was not named as a Defendant. The Plaintiffs thereafter amended

their complaint to name Time as a Defendant. Time moved to dismiss claiming that the amended complaint was barred by Fed. R. Civ. P. 15(c) because it added a new party Defendant and was not served within the applicable statute of limitations. The District Court granted the motion to dismiss, holding that Rule 15(c) required service within the applicable statute of limitations before the amendment adding the new party would relate back to the original pleading.

This Court affirmed the dismissal and held:

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone, supra at 29, 106 S. Ct. at 2384.

In the case at bar, the District Court concluded that the first three factors of *Schiavone* were satisfied. The Court ruled, however, that the fourth factor was not satisfied because the service upon Respondent's statutory agent was not completed until July 8, 1988, seven (7) days after the statute of limitations had expired.[1] Since service

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[1] Petitioner was injured on July 1, 1986. The statute of limitations on Petitioner's cause of action was two years.

(Continued on following page)

was not completed within the statutory period, the Court ruled that Respondent could not be named as a new party defendant.

The most glaring error in the District Court's reasoning is its conclusion that the proposed amendment sought to change the party against whom the claim was asserted. As noted above, the proposed amendment merely sought to correct a misnomer, not to change the party defendant. As no new party was sought to be added, the relation back principles espoused in *Schiavone, supra,* are inapplicable.

In *Schiavone,* this Court placed great reliance upon the designation of only "Fortune" in both the caption and the body of the complaint. *Id.* at 23. There, the Plaintiff did not name Time in either the caption or the body of the complaint. *Id.* at 23 and 27. Here, however, the defendant was listed as a Division of General Motors in both the caption and the body with Respondent's statutory agent also being named and served with process within the time limits of Rule 4. Therefore, it is obvious in the present case that Petitioner was not trying to change the party against whom the plaintiff was serving, but, in accordance with Rule 15(c), was merely attempting to correct the misnomer of a defendant who was put on notice by prompt service. It is clear that the party before the Court is the party Petitioner intended to sue. Under such circumstances, *Schiavone* is distinguishable and the

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Hunter v. Shenango Furnace Co., 38 Ohio St. 3d 235, 527 N.E. 2d 871 (1988). The complaint was filed on June 30, 1988, within the statutory period.

amendment correcting an erroneous description of the defendant, a simple misnomer, must be permitted with relation back. *Datskow v. Teledyne, Inc.*, 899 F. 2d 1298 (2d Cir. 1990); *Dandrea v. Malsbary Mfg. Co.*, 839 F. 2d 163 (3d Cir. 1988); *Bell v. P & B Mfg. Corp.*, 107 F.R.D. 371 (W.D. Tenn. 1985).

A similar case involving a misnomer is that of *Grooms v. Greyhound Corp.*, 287 F. 2d 95 (6th Cir. 1961). That case not only emanates from the Sixth Circuit, but provides a cogent example of the proper procedure in such circumstances. In *Grooms*, the plaintiffs filed a complaint in the Court of Common Pleas of Franklin County, Ohio for damages for personal injuries naming Pennsylvania Greyhound Lines, Inc. as defendant. When the plaintiff encountered difficulty in serving the defendant, she filed a motion for leave to amend her petition alleging that she had "discovered that the name 'Pennsylvania Greyhound Lines, Inc.' was a misnomer, and that the correct name of the defendant is 'The Greyhound Corporation, Eastern Division'." *Id.* at 97. The state court permitted the amendment and summons was duly perfected. Greyhound removed the case to federal court on the basis of diversity of citizenship and moved to dismiss claiming that the statute of limitations had expired prior to service. The Sixth Circuit reversed the District Court's dismissal of the suit and held that the amendment was proper and related back to the original complaint because the plaintiff had merely sought to correct a mistake in the name of the defendant.

The present case is strikingly similar to *Grooms*. Petitioner initially named the Inland Division of General Motors as defendant. When the defendant asserted that

this designation was improper, Petitioner sought to correct the alleged misnomer by identifying the defendant as General Motors Corporation. The proposed amendment did not seek to add a new cause of action or a new party. The causes of action against Respondent alleged in the amended complaint were identical to those alleged in the original complaint. It is undisputed that the proper party defendant, General Motors Corporation, received the service through its statutory agent, C.T. Corp. System. The proposed amended complaint maintained this designation of the statutory agent. Therefore, Respondent cannot claim that it would be prejudiced by the amendments. The District Court even acknowledged this lack of prejudice in its Decision at page 3:

> "In this case, there is no doubt the claim set forth in the proposed Amended Complaint arises from the same workplace injury that prompted the original Complaint. It also appears that General Motors has received notice, since the original Complaint was sent to its statutory agent. General Motors knew, or should have known, that it was the proper defendant to this action. Further, General Motors has not demonstrated that the improper naming of its wholly-owned division, Inland, has prejudiced it in its defense of this action."

A crucial factor in determining whether leave to amend should be granted is the resulting prejudice to the opposing party. *Jordan v. County of Los Angeles*, 669 F. 2d 1311, 1324 (9th Cir. 1982), vacated in part on other grounds, 459 U.S. 810 (1982). Where, as here, there would clearly be no prejudice to the opposing party by the correction of a misnomer and no substantial reason has

been advanced for denying leave to amend, the amendment must be freely given with such amendment relating back to the original pleading pursuant to Rule 15(c). *Dussouy v. Gulf Coast Investment Corp.*, 660 F. 2d 594 (5th Cir. 1981).

III.

SHOULD STATE LAW CONCERNING THE TOLLING OF THE STATUTE OF LIMITATIONS AND SERVICE OF PROCESS BE APPLIED BY A DISTRICT COURT IN DETERMINING WHETHER A PROPOSED AMENDED COMPLAINT WOULD RELATE BACK TO THE DATE OF THE ORIGINAL COMPLAINT, WHICH WAS INITIALLY FILED BY THE PLAINTIFF IN STATE COURT THEN REMOVED TO FEDERAL COURT BY THE DEFENDANT?

A second and more fundamental error by the District Court and Court of Appeals was the failure to apply Ohio law in its interpretation of Rule 15(c) and the relation back principles of *Schiavone, supra*. When Ohio law governing the tolling of the statute of limitations and service of process is properly applied in accordance with the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), it is evident that the decisions of the courts below were erroneous even under a *Schiavone* analysis. By granting the Writ, this Court can reaffirm the principles of *Erie* and establish definitively the corollary to *Walker v. Armco Steel Corp., supra*, that an action based on state law that would survive in state court should not be barred in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. *Id.*, at 753, 100 S. Ct. at 1986.

At the time of the proceedings below, Rule 15(c) would allow relation back "if the claim asserted and the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, and the party to be brought in by the amendment received notice of the action, within the period provided by law for commencing the action." This Court has held that this period must be determined by applying state law concerning the commencement of an action and the tolling of the statute of limitations. *Walker v. Armco Steel, supra*. In applying *Walker*, the Sixth Circuit has held:

> When the application of state tolling and service of process provisions would affect the running of the statute of limitations and thus affect the outcome of the lawsuit in state court, a federal court in a diversity action should apply those same state rules of decision in determining whether an action is barred by the applicable statute of limitations.

Ringrose v Engelberg Huller Co., Inc., 692 F. 2d 403, 405 (6th Cir. 1982). This mandate is even more forceful when, as here, the action was originally commenced in state court. *Peterson v. Sealed Air Corp.*, 902 F. 2d 1232, 1234 (7th Cir. 1990) (holding that failure to apply state law to determine the sufficiency of service when the case was pending in state court would raise substantial questions under the Rules Enabling Act and the Rules of Decision Act). It is thus clear that Ohio law governing the commencement of an action should have controlled the instant matter. When Ohio law is applied, it is clear that the proposed amendment would be timely and would relate back to the original complaint.

In Ohio, "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Rule 15(C) . . . . " Ohio R. Civ. P. 3(A); *Goolsby v. Anderson Concrete Corp.*, 61 Ohio St. 3d 549, 575 N.E. 2d 801 (1991). This rule makes it clear that in Ohio the requirement of notice within the "period provided by law for commencing the action" is satisfied by the timely filing of the complaint and "notice" to the party to be added within one year thereafter. *Goolsby, supra; Lash v. Miller*, 50 Ohio St. 2d 63, 362 N.E. 2d 642 (1977). Notice to the party sought to be added may be actual or constructive. See, *Berndt v. Tennessee*, 796 F. 2d 879 (6th Cir. 1986); *Richmond v. McElyea*, 130 F.R.D. 377 (E.D. Tenn. 1990).

In the present case, it is undisputed that the complaint was filed within the applicable statute of limitations. See Footnote 1, *supra*. Under Ohio law, the statute of limitations was then tolled for one year to allow for service of process. *Goolsby, supra*. Service was made upon Respondent's statutory agent on July 8, 1988. Respondent thus had actual notice of his suit within the period provided by Ohio R. Civ. P. 3(A). Even if the caption is construed as naming the wrong defendant, Respondent still had such constructive notice that it knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it. There has been no claim that the caption confused or misled Respondent or its agent. Further, it cannot reasonably be argued that Respondent would have received better notice or earlier notice if the caption had read "General Motors Corporation" as

opposed to "Inland Division of General Motors." Clearly, there was no prejudice to Respondent in maintaining its defense on the merits. Accordingly, Petitioner's proposed amendment would relate back to the date of the original complaint and would not be barred by the statute of limitations. *Berndt, supra; McElyea, supra.*

The foregoing analysis clearly demonstrates that under Ohio law the procedural requirements for the relation back of Petitioner's proposed amended complaint were met in this case. In fact, Respondent has never disputed that the proposed amendment would relate back under Ohio law as notice was supplied to Respondent by service upon its agent within the time prescribed by Ohio R. Civ. P. 3(A) for commencing an action. Instead, Respondent had the action removed to federal court in order to take advantage of the restrictive interpretation of Rule 15(c) espoused in *Schiavone, supra.* Such conduct constitutes nothing more than "forum shopping" which has repeatedly been condemned by this Court since *Erie, supra.* To allow Respondent to effectively shorten the life span of this action in federal court where the suit would properly survive in state court clearly violates the principles outlined in *Erie* and its progeny and would unquestionably result in the inequitable administration of the laws. See, *Walker v. Armco Steel, supra* at 753, 100 S. Ct. at 1986; *Hanna v. Plumer,* 380 U.S. 460, 468, 85 S. Ct. 1136, 1142 (1965). To discourage such blatant forum shopping, this Court must grant the Writ and reaffirm the equitable principles of *Erie* and its progeny.

IV.

DO THE 1991 AMENDMENTS TO FED. R. CIV. P. 15(c) APPLY RETROACTIVELY TO A CASE PENDING ON APPEAL WHEN THE AMENDMENTS TOOK EFFECT AND WHERE THE LOWER COURT JUDGE EXPRESSLY STATED THAT THE AMENDMENTS WOULD PRODUCE A MORE FAIR RESULT?

While this case was pending in the courts below, Rule 15(c) was amended to read as follows:

> Relation Back Of Amendments. An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. . . .

In transmitting these amendments to Congress, this Court specifically stated "[t]hat the foregoing additions to and changes in the Federal Rules of Civil Procedure . . . shall take effect on December 1, 1991, and shall

govern all proceedings in civil actions thereafter commenced and, insofar as just and practicable, all proceedings in civil actions then pending." Order, 111 S. Ct. 813 (April 30, 1991) (Appendix F). Thus, the Rule was expressly made retroactive "insofar as just and practicable." In the present case, it cannot be questioned that retroactive application of Rule 15(c) would be just and practicable. The district court even recognized this fact when it stated in its Decision that "the court is of the opinion that the amendments to Rule 15(c), if adopted, would produce a more fair result in this and similar cases. . . . " Decision and Entry Overruling Motion to Amend at p. 6. (Appendix D).

Petitioner, therefore, requests that this Court grant the Writ to allow for the retroactive application of Rule 15(c). By granting the Writ, this Court can affirmatively establish the retroactivity of Rule 15(c) and foster the spirit and inclination of the Rules to favor decisions on the merits. *Conley v. Gibson, supra,* at 48. As this Court stated in *Schiavone,* "[t]he principle function of the procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." *Schiavone, supra,* at 27. Where an expressly retroactive amendment to the Rules of Civil Procedure has gone into effect and would unquestionably result in a fair and equitable resolution of a pending matter, justice requires that the amendment be given effect.

CONCLUSION

The case *sub judice* involves substantial issues concerning the interpretation and application of the Federal Rules of Civil Procedure and precedents emanating from this Honorable Court. Particularly, Petitioner contends that the dismissal of Respondent as a defendant and the refusal to allow Petitioner to amend the complaint to correct a misnomer when the proper defendant was before the court and its statutory agent had been timely served, was a clear violation of the liberal intent of the Civil Rules to facilitate disposition on the merits. The error of the court below is amplified by its refusal to allow the retroactive application of amendments to the Civil Rules which would clearly result in a fair and equitable result under the facts of this case.

Therefore, in accordance with the foregoing arguments, Petitioner asserts that the Petition for a Writ of Certiorari must be granted.

Respectfully submitted,

BRANNON, GIANUGLOU, DANKOF
& CARAS

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APPENDICES

APPENDIX A

Not Recommended for Publication

No. 91-3067

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WANDA M. BINGHAM,

Plaintiff-Appellant,

v.

INLAND DIVISION OF GENERAL MOTORS,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio.

(Filed Oct. 31, 1991)

BEFORE: RYAN and NORRIS, Circuit Judges; and DUGGAN, District Judge.*

RYAN, Circuit Judge. Plaintiff Wanda Mae Bingham appeals the district court's judgment dismissing the named defendant "Inland Division of General Motors" in this personal injury diversity action. Plaintiff argues on appeal that the district court erred in quashing service of process and in denying a motion to amend the complaint to name "General Motors Corporation" as the proper defendant in this case.

Wanda Mae Bingham brought this tort action for injuries sustained at her place of employment, the Inland Division of General Motors ("Inland"), on July 1, 1986.

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* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

On June 30, 1988, one day prior to the running of the two-year statute of limitations on her claim, plaintiff filed her complaint, naming the defendant in the caption as "The Inland Division of General Motors, Agent C.T. Corp. System," and describing the purported defendant in the body of the complaint as "a corporation organized under the laws of the State of Delaware, with a place of business located at 2701 Home Avenue, City of Dayton, County of Montgomery, the State of Ohio, doing business in the manufacture of parts for General Motors automobiles." General Motors Corporation's agent for service of process in Ohio, C.T. Corporation System, was served on July 8, 1988, seven days after the expiration of the statute of limitations.

Through special appearance, General Motors Corporation moved to quash service of process and return of service, and to dismiss "the Inland Division of General Motors" for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), (4), and (5). Because Inland is a wholly-owned operating division of General Motors Corporation, has no independent legal status, and is not capable of being sued, the district court quashed service of process and return of service.

Plaintiff then moved for leave to amend the complaint to name the "General Motors Corporation" as defendant. General Motors Corporation, once again through special appearance, opposed the motion, arguing that the amendment would be futile because GM did not have notice of the action within the prescribed limitations period and, therefore, the proposed amended complaint would not "relate back" to the date of the original filing under Fed. R. Civ. P. 15(c) and would be barred by Ohio

law. The district court denied the motion for leave to amend, relying upon the Supreme Court's interpretation of Rule 15(c) in *Schiavone v. Fortune*, 477 U.S. 21 (1986).

For the reasons set forth in the well-written opinions prepared by the Honorable Walter H. Rice quashing service of process and denying plaintiff's motion for leave to amend her complaint, we **AFFIRM.**

APPENDIX B

United States District Court

SOUTHERN DISTRICT OF OHIO

WANDA MAE BINGHAM

V.

THE INLAND DIVISION OF GENERAL MOTORS, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C-3-88-486

(Filed Dec. 14, 1990)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff's motion to amend is overruled;

that defendant General Motors' motion to strike the affidavit of Dwight Brannon is overruled;

that the plaintiff's motion to quash removal is overruled;

that the above captioned cause is hereby terminated.

December 14, 1990
Date

KENNETH J. MURPHY
Clerk

/s/ E Osborn
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WANDA MAE BINGHAM, :

Plaintiff, : Case No. C-3-88-486

vs.

THE INLAND DIVISION OF GENERAL MOTORS. et al., : Judge Walter Herbert Rice

: (Filed Dec. 14, 1990)

Defendants. :

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION TO AMEND COMPLAINT (DOC. #33); GENERAL MOTORS' MOTION TO STRIKE THE AFFIDAVIT OF DWIGHT D. BRANNON (DOC. #53) OVERRULED; PLAINTIFF'S MOTION TO QUASH REMOVAL (DOC. #58) OVERRULED; TERMINATION ENTRY

This is a personal injury action brought by Plaintiff Wanda Mae Bingham to recover for injuries she received while an employee of Defendant Inland Division of General Motors. Plaintiff's Complaint was filed in the Court of Common Pleas, Montgomery County, Ohio, and named as defendants Inland Division of General Motors, Agent C.T. Corp. System and G.M. Fanuc Robotics Corporation. A petition for Removal (Doc. #1) was filed by Defendant Inland Division. Defendant Fanuc Robotics was subsequently dismissed from this action upon motion by Plaintiff (Doc. #52).

Following removal, it was determined that Plaintiff had erroneously named "The Inland Division of General Motors, Agent C.T. Corp. System" in her Complaint. General Motors Corporation, through a special appearance, filed a Motion to Quash Service of Process (Doc. #10). That Motion was based on the fact that Inland Division is a wholly-owned operating division of General Motors, and has no independent legal status. General Motors was not named in the Complaint. C.T. Corp. System is General Motors' agent in Ohio for service of process. This Court conditionally sustained General Motors' Motion to Quash (Doc. #24), and subsequently made that decision absolute (Doc. #31), dismissing Inland as a Defendant. Therefore, technically no defendants remain in this case.

Plaintiff has filed a Motion to Amend her Complaint (Doc. #33), pursuant to Fed. R. Civ. P. 15, seeking to name General Motors Corporation as Defendant. This is, in effect, a motion to change the party against whom a claim is asserted. As such, it is governed by Rule 15(c), which states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his

> defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The United States Supreme Court has determined that there are four elements to a valid Rule 15(c) substitution of parties:

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone v. Fortune, 477 U.S. 21, 29 (1986).

In this case, there is no doubt the claim set forth in the proposed Amended Complaint arises from the same workplace injury that prompted the original Complaint. It also appears that General Motors has received notice, since the original Complaint was sent to its statutory agent. General Motors knew, or should have known, that it was the proper defendant to this action. Further, General Motors has not demonstrated that the improper naming of its wholly-owned division, Inland, has prejudiced it in its defense of this action. Therefore, the first three *Schiavone* requirements are met.

The final factor, however, has not been satisfied. Plaintiff's alleged injury, according to the original Complaint occurred on July 1, 1986. The statute of limitations on Plaintiff's cause of action is two years. *See Hunter v. Shenago Furnace Co.*, 38 Ohio St. 3d 235, 527 N.E.2d 871 (1988). The Complaint was filed in the Court of Common Pleas on June 30, 1988. General Motor's authorized agent received notice of the suit on July 8, 1988. Although the Complaint was filed within the prescribed two-year period, service was not completed until after the statute of limitations had expired. Rule 15(c) states that the party to be added must have notice of the action "within the applicable limitations period." Since neither Inland nor C.T. Corp. Systems was served *prior to the expiration of the limitations period*, there was no notice which could be imputed to General Motors. *Schiavone*, 477 U.S. at 29.

On October 23, 1990, Plaintiff requested leave to file a Supplemental Memorandum (Doc. #64) in support of her position. The Court has sustained Plaintiff's request by Notation Order of December 12, 1990, and has considered the additional arguments raised therein. The main thrust of the new argument seems to be that Plaintiff named the right party, "but the wording was not in the proper 'legal' order." This is a distinction without a difference. For whatever reason, Plaintiff's original Complaint named an entity which is not capable of being sued. The Court made that determination in its previous Orders (Doc. #'s 24, 31) and that issue will not now be revisited.

Attached to Plaintiff's Supplemental Memorandum is an unreported decision of Judge John W. Kessler of the Montgomery County Court of Common Pleas. In *Thompson v. Aivars Vitols, D.O., Inc.*, Case No. 87-2027

(Oct. 25, 1989), a plaintiff was allowed to amend a complaint to add a new defendant, pursuant to Ohio R. Civ. P. 15(c). That rule is identical to Fed. R. Civ. P. 15(c). *Thompson* does not alter the Court's conclusions.

First, federal courts follow federal procedure. To the extent that Ohio Rule 15 has been given a meaning different from its federal counterpart by the Ohio courts, those decisions are not controlling. This Court is bound to follow Rule 15(c) as interpreted by the Supreme Court in *Schiavone*.

Second, the *Thompson* decision was premised on a substantially different fact situation. In that case, the plaintiff originally named four defendants, including Sycamore Hospital. The complaint was filed within the applicable limitations period. Sycamore Hospital was subsequently voluntarily dismissed by the plaintiff. Then, almost a year later, the plaintiff sought leave to file an amended complaint, renaming the hospital. Under those circumstances, the amendment related back because Sycamore Hospital was correctly named and then voluntarily dismissed. Moreover, by virtue of being named in the original complaint, Sycamore had notice of the action *within the prescribed limitations period*.

In this case, General Motors did not receive notice until over a week after the statute of limitations had run. Rule 15(c), as interpreted by *Schiavone*, therefore mandates dismissal of this action. However, the Court takes judicial notice of the fact that the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed a number of amendments to the Federal Rules of Civil Procedure.

Among the proposed changes is an amendment to Rule 15(c) which would alter the *Schiavone* result to allow relation back where the party to be substituted receives notice of the suit within 120 days after the filing of the Complaint, even if the complaint fails to name the correct party.

Unfortunately, these amendments are not imminent. The proposed changes have been sent to the Supreme Court and are under review. The Supreme Court is scheduled to send its recommendations to Congress no later than May 1, 1991. If Congress approves of the proposed changes, said changes will take effect as of December 1, 1991.[1]

While the Court is of the opinion that the amendments to Rule 15(c), if adopted, would produce a more fair result in this and similar cases, it is constrained to apply the rules in force at this time. In addition, it would be unfair to General Motors to delay deciding this case for almost another full year in order to see if Plaintiff might be saved by an amendment to Rule 15(c). However, it should be noted that there is nothing to prevent Plaintiff from appealing this decision, and requesting the United States Court of Appeals for the Sixth Circuit to stay the appeal until after action has been taken on the proposed rule changes. If the Sixth Circuit is amendable to staying the appeal, and if the proposed rule changes

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[1] This timetable was presented to the Court via telephone conversation with the Office of the Judicial Conference Secretariat, Administrative Office of the United States Courts, Washington, D.C.

are adopted, the case could then be remanded to this Court for a decision on the merits.

There remain two motions pending to be ruled upon at this time. The first is General Motors' Motion to Strike the Affidavit of Dwight D. Brannon (Doc. #53). Mr. Brannon is counsel for Plaintiff in this case. He filed an Affidavit (Doc. #51) stating that he has had considerable dealings with Inland and has always seen it designated as "Inland Division of General Motors," and never merely as General Motors.

General Motors bases its Motion to Strike on Canon 5 of the Code of Professional Responsibility. Specifically, General Motors cites Disciplinary Rule 5-102, which reads:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it becomes obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation . . .

The Motion to Strike is not well taken. It does not appear that Mr. Brannon is attempting to insert himself s [sic] a witness for his client. The Court reads his Affidavit as merely an explanation of why he chose to sue Inland rather than General Motors; in essence, he is attesting to his good faith.

While the Court does not doubt that the misnaming of parties was due neither to bad faith nor to lack of diligence on Mr. Brannon's part, that is a non-issue here. The clear lesson of *Schiavone* is that if one is going to sue

the wrong party, he or she had better perfect service within the period of limitations. Since good faith is not a bar to dismissal, Mr. Brannon's Affidavit is largely irrelevant. However, there is no reason to strike it from the record.

Finally, Plaintiff has filed a Motion to Quash Removal (Doc. #58). Plaintiff argues that this case is improperly before the Court because her cause of action is an "employer intentional tort" and, thus, falls within Ohio Rev. Code § 4121.80. Because that section allows a cause of action to be brought only in the county where the injury was sustained, Plaintiff asserts that "it is clear that the legislature and Ohio Supreme Court has [sic] indicated that the sole jurisdiction for Workers' Compensation matters, which the intentional tort is part of, lies with the court of common pleas in the county in which the injury or disease occurred."

Without deciding whether this is, indeed, a § 4121.80 case, the Court notes that, Plaintiff's interpretation of Ohio law notwithstanding, the framers of the Constitution have indicated that the judicial power of this Court extends to controversies "between Citizens of different States." U.S. Const. art. I, § 2. Pursuant to this authority, Congress has enacted 28 U.S.C. § 1332, which provides federal district courts with original jurisdiction over cases arising between "citizens of different States" with an appropriate amount in controversy. General Motors is a citizen of Michigan. Plaintiff is a citizen of Ohio. Even if Plaintiff is correct in interpreting § 4121.80 as an attempt by the State of Ohio to exclude her cause of action from federal court, Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Court concludes, therefore, that it has jurisdiction over the subject matter of this case. Plaintiff's Motion to Quash Removal (Doc. #58) is overruled.

Wherefore, based upon the above, the Court finds Plaintiff's Motion to Amend her Complaint (Doc. #33) to be not well taken and same is, therefore, overruled. General Motor's Motion to Strike the Affidavit of Dwight D. Brannon (Doc. #53) is overruled. Plaintiff's Motion to Quash Removal (Doc. #58) is overruled.

The captioned cause is hereby terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

/s/ Walter Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies mailed to:

Dwight D. Brannon, Esq.
Rodney M. Brown, Esq.
John M. Kunst, Jr., Esq.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WANDA MAE BINGHAM, Plaintiff,	:	Case No. C-3-88-486
vs.		
THE INLAND DIVISION OF GENERAL MOTORS, et al., Defendants.	:	(Filed July 11, 1989)

DECISION AND ENTRY *CONDITIONALLY* SUSTAINING MOTION OF DEFENDANT, GENERAL MOTORS CORPORATION, SEEKING AN ORDER OF THE COURT, PURSUANT TO FED. R. CIV. P. 12(b) (2), (4) and (5) TO QUASH SERVICE OF PROCESS, RETURN OF SERVICE AND TO DISMISS THE CAPTIONED CAUSE AS TO THE DEFENDANT, THE INLAND DIVISION OF GENERAL MOTORS, AGENT C. T. CORP. SYSTEM (DOC. #10); FURTHER PROCEDURES ORDERED OF MOVING PARTY; OBSERVATIONS OF THE COURT

Based upon the reasoning and citations of authority set forth in the memoranda of General Motors Corporation, through its special appearance, seeking an Order of the Court, pursuant to Fed. R. Civ. P. 12 (b)(2), (4) and (5), quashing service of process and return of service and, further, dismissing the action as to the named Defendant "The Inland Division of General Motors, Agent C. T. Corp. System" (Doc. #10), the Court deems said motion

to be *conditionally* well taken and does, therefore, *conditionally* sustain same in its entirety. In ruling as aforesaid, the Court makes the following, non-exclusive, observations:

1. The aforesaid ruling is conditional only, in view of the fact that the Donovan affidavit, referred to on at least one-half dozen occasions throughout the moving papers, is neither attached to any document that has been filed with this Court nor, for that matter, filed as a free standing entity. Assuming the Donovan affidavit says what counsel for General Motors Corporation states that it says, to wit: that Inland is not a corporate entity and has not been incorporated under the laws of any state; has no corporate charter, articles, bylaws or regulations; has issued no stock, has no directors or officers, and has no designated agent for service of process, the motion at issue would be well taken. Since the Donovan affidavit has not been filed, however, this Court can only engage in the assumption that counsel's representation as to the contents of said affidavit are accurate and, accordingly, this Court will *conditionally* sustain said motion. Should the Donovan affidavit be filed within fourteen days from date of receipt of notice of this entry and, further, should said affidavit set forth that which counsel represents that it does indeed state, the aforementioned ruling will be made absolute.

2. Since Inland Division is a wholly-owned operating division of General Motors Corporation and, since standing alone, Inland Division has no independent legal status, Inland Division is not a legal entity subject to suit. A court cannot exert personal jurisdiction to enforce its judgment against a corporation if the corporation has not

been properly named as a party to suit. Assuming, *arguendo*, that Plaintiff intended to sue the General Motors Corporation, said intention has not been carried into effect if suit is filed against a fully-owned operating division of the purported corporate defendant.

3. An action may only be brought against the party who actually or legally exists and has the capacity to be sued, whether that party is a corporation, partnership or individual. However, a wholly-owned division of a corporate entity is not a proper party to be sued. One cannot achieve personal jurisdiction over a corporation by filing suit against a wholly-owned division of said corporation.

4. The moving entity has not appeared in this action in such a manner as to waive its defenses. *See* Reply Memorandum to Plaintiff's Opposition to Motion to Dismiss or to Quash Service (Doc. #13).

5. The Plaintiff's Request for Sanctions under Fed. R. Civ. P. 11 is not well taken, given the fact that the motion to which the sanctions request is directed has been found by this Court to be well taken.

WHEREFORE, based upon the aforesaid, the Motion of the General Motors Corporation, seeking an Order of the Court quashing service of process and return of service and, further, dismissing the Plaintiff's Complaint against the purported Defendant, The Inland Division of General Motors, Agent C. T. Corp. System (Doc. #10), is deemed by this Court to be well taken and same is, therefore, *conditionally* sustained in its entirety. Service of process and return of process against said purported Defendant is *conditionally* quashed and the captioned cause *conditionally* dismissed against said purported

Defendant. As indicated above, the moving party is to file the Donovan affidavit within 14 days from date of receipt of notice of this decision. Assuming said affidavit is filed and, further, assuming that it reflects that which counsel has represented, this Court's conditional ruling will be made absolute.

Assuming that the purported Defendant Inland Division is dismissed as a party Defendant, this Court anticipates a motion from Plaintiff seeking leave of Court to file an Amended Complaint adding as a party Defendant the General Motors Corporation. The Court would then assume that Fed. R. Civ. P. 15(c) dealing with relation back of amendments will become a topic of conversation between Court and counsel. This Court would assume that Plaintiff would argue, within the meaning of Rule 15(c), that the Plaintiff's amendment adding General Motors Corporation would relate back, so as to avoid the bar of any statute of limitations, since the claim asserted against General Motors Corporation arose out of the conduct, transaction or occurrence set forth in the original pleading *and* within the two-year period of time provided by law for commencing the action against the party to be brought in by amendment, General Motors Corporation has (1) received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party (a misnomer), the action would have been brought against General Motors Corporation. To that claim of Plaintiff, this Court anticipates General Motors Corporation arguing that although the Complaint was filed within the two-year period provided by law

(actually one day prior to the expiration of the two-year period), the General Motors Corporation did not receive word from its corporate agent, C. T. Corporation, until long after the expiration of the two-year period of time and that, accordingly, General Motors did not receive such notice of the institution of the action within the two-year period of time. At any rate, such claims and contentions await the filing of the Donovan affidavit, this Court's making the above mentioned conditional ruling absolute and, should same be done, a request by Plaintiff's counsel to file an Amended Complaint against the General Motors Corporation.

/s/ Walter H. Rice
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

Copies mailed to:

Dwight Brannon, Esq.
John M. Kunst, Jr., Esq.
Nancy Korb Griffiths, Esq.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WANDA MAE BINGHAM, :

Plaintiff, : Case No. C-3-88-486

vs.

THE INLAND DIVISION OF : (Filed Aug. 11, 1989)
GENERAL MOTORS, et al.,

Defendants. :

THE DONOVAN AFFIDAVIT HAVING BEEN FILED, THIS COURT'S DECISION AND ENTRY OF JULY 11, 1989, CONDITIONALLY SUSTAINING THE MOTION OF THE DEFENDANT, GENERAL MOTORS CORPORATION, SEEKING AN ORDER OF THE COURT, PURSUANT TO FED. R. CIV. P. 12 (b) (2), ETC., IS MADE ABSOLUTE; CAPTIONED CAUSE DISMISSED AS TO DEFENDANT, THE INLAND DIVISION OF GENERAL MOTORS, AGENT, C. T. CORP. SYSTEM

The Donovan affidavit having been filed (Doc. #26), this Court's Decision and Entry of July 11, 1989 (Doc. #24), conditionally sustaining the Motion of the Defendant, General Motors Corporation, seeking an Order of the Court, pursuant to Fed. R. Civ. P. 12(b)(2), (4) and (5) to quash service of process, return of service and to dismiss the captioned cause as to the Defendant, the

Inland Division of General Motors, Agent C.T. Corp. System, is made absolute. Said Defendant is ordered dismissed as a party Defendant to this litigation.

/s/ Walter Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

APPENDIX E

Case No: 91-3067
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

WANDA MAE BINGHAM

Plaintiff – Appellant

v.

INLAND DIVISION OF GENERAL MOTORS

Defendant – Appellee

(Filed Dec. 4, 1990)

BEFORE: RYAN and NORRIS, Circuit Judges; and DUGGAN, District Judge.*

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* The Honorable Patrick J. Dugan, United States District Judge for the Eastern District of Michigan sitting by designation.

APPENDIX F

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE*

SUPREME COURT OF THE UNITED STATES

April 30, 1991

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein new chapter headings VIII and IX, amendments to Rules C and E of the Supplemental Rules for certain Admiralty and Maritime Claims, new Forms 1A and 1B to the Appendix of Forms, the abrogation of Form 18A, and amendments to Civil Rules 5, 15, 24, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 63, 72, and 77, as hereinafter set forth.

[See *infra*, pp. ___ ___ ___]

2. That the foregoing additions to and changes in the Federal Rules of Civil Procedure, the Supplemental Rules for Certain Admiralty and Maritime Claims, and the Civil Forms shall take effect on December 1, 1991, and shall govern all proceedings in civil actions thereafter commenced and, insofar as just and practicable all proceedings in civil actions then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing

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* Editors Note: Congress may postpone effective date of these rules or may decline to approve them or make changes.

addition to and changes in the Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

No. 91-1447

In The

Supreme Court of the United States

October Term, 1991

WANDA MAE BINGHAM,

Petitioner,

v.

INLAND DIVISION OF GENERAL MOTORS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR GENERAL MOTORS CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court should exercise its discretion to review the court of appeals' unreported decision affirming the district court's dismissal of a claim against a named defendant who petitioner concedes is not a legal entity capable of being sued.

II. Whether the Court should exercise its discretion to review the court of appeals' unreported decision affirming the district court's decision properly applying Rule 15(c) of the Federal Rules of Civil Procedure and *Schiavone v. Fortune*, 477 U.S. 21 (1986) in denying leave to amend to add a proper defendant.

III. Whether the Court should exercise its discretion to consider petitioner's argument, waived in the courts below, that state procedural law, rather than federal law, applies to her motion to amend.

IV. Whether the Court should exercise its discretion to determine whether revised Rule 15(c) of the Federal Rules of Procedure should be applied in the particular circumstances of this case, when petitioner failed to raise the issue after the amendment took effect, and application of the revised Rule in this case would not be just.

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BRIEF FOR GENERAL MOTORS CORPORATION IN OPPOSITION

General Motors Corporation ("GM"), pursuant to its special appearance (App. 1, *infra*), submits this brief in opposition to the petition for a writ of certiorari.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is unreported. The opinions of the district court conditionally granting GM's motion to quash service of process and return of service and to dismiss (Pet. App. C); making the conditional dismissal absolute (Pet. App. D); and denying petitioner's motion to amend (Pet. App. B); also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1991. A petition for rehearing was denied on December 4, 1991. The petition for a writ of certiorari was filed on March 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] The list of GM's non-wholly owned subsidiaries required by Rule 29.1 appears at App. 3, *infra*.

STATEMENT OF THE CASE

The issue presented in this case is whether a proper application of old Rule 15(c) of the Federal Rules of Civil Procedure, as conclusively interpreted by this Court, and uniformly applied by the courts of appeals, should be reviewed on the facts of this specific case, in the interest of "fairness." Seeking relief from the legally required consequences of her own delay in filing suit and her subsequent procedural omissions, petitioner asks this Court to excuse her failure to sue a defendant with the legal capacity to be sued, to re-examine precedent which has been legislatively overruled and to consider arguments not raised below. However, the decision of the court of appeals is correct, and does not conflict with any decision of this Court or any other court of appeals. Beyond this, petitioner's fact-bound request for relief from the judgment below presents no questions of important legal significance. Review by this Court is therefore unwarranted.

The pertinent procedural facts are set forth in the court of appeals' decision (Pet. App. A). Petitioner sought to assert an intentional tort claim against her employer. As petitioner admits, her Complaint was filed on the last day before the statute of limitations expired. Despite the dangers inherent in such eleventh-hour filing, petitioner did not investigate to determine the proper defendant. Petitioner sued "Inland Division of General Motors." Petitioner does not dispute that "Inland" is only an operating division of GM, and is not a legal entity capable of being sued. Nor does petitioner dispute that GM had no notice of the action within the limitations period. GM

moved to dismiss, and to quash service and return of service.

The district court granted the motion, stating:

> Since Inland Division is a wholly owned operating division of General Motors Corporation and, since standing alone, Inland Division has no independent legal status, Inland Division is not a legal entity subject to suit. A court cannot exert personal jurisdiction to enforce its judgment against a corporation if the corporation has not been properly named as a party to suit. Assuming, *arguendo*, that Plaintiff intended to sue the General Motors Corporation, said intention has not been carried into effect if suit is filed against a fully-owned operating division of the purported corporate defendant.

(Pet. App. C at 15a-16a). Thus, the district court quashed service of process and return of process, and dismissed petitioner's claim against Inland.

After the district court sustained the motion to dismiss, petitioner moved to amend her Complaint to name GM as a defendant. The complaint had also asserted a product liability claim against GM Fanuc, which continued after "Inland" had been dismissed. While the motion to amend was pending, Fanuc moved for dismissal as a sanction against petitioner, who had failed to comply with the district court's pretrial order. Petitioner then voluntarily dismissed her claim against Fanuc.

Petitioner did not ask the district court to apply Ohio law to her motion to amend. In that motion, and subsequent memoranda, petitioner urged the district court to apply federal precedents. At no time before appeal did

petitioner challenge application of federal Rule 15(c) to her proposed amendment.[2]

On December 14, 1990, the District Court denied petitioner's Motion To Amend. Rule 15(c) of the Federal Rules of Civil Procedure controls relation back of amended pleadings. As then in effect, Rule 15(c) required notice to a new party "within the period provided by law for commencing an action" before an untimely amendment could "relate back" to a timely-filed complaint. In *Schiavone v. Fortune*, 477 U.S. 21 2379 (1986), this Court conclusively determined that the "period provided by law" in Rule 15(c) was the statute of limitations. Thus, if a defendant to be added was served or otherwise received notice outside the statute of limitations, an amended complaint could not relate back. Applying *Schiavone*, the district court ruled that, because the misdirected suit reached GM's statutory agent out of time, Rule 15(c) prohibited relation back. Thus, petitioner's claim against GM was barred by the statute of limitations.

---

[2] Petitioner's "Motion to Quash Removal," referenced in the Petition, is no exception. That motion argued that petitioner's claim against GM arose under Ohio's Workers' Compensation Act and was thus not removable. Because the statute's intentional tort provision (O.R.C. § 4121.80) was limited to injuries occurring on or before August 1, 1986, however, it did not apply to this case. Petitioner's appropriation of § 4121.80 was particularly curious, as the statute had a one-year statute of limitations, and would have rendered her claims time-barred. The Ohio Supreme Court declared § 4121.80 unconstitutional in *Brady v. Safety-Kleen*, 61 Ohio St.3d 624, 624, 576 N.E. 2d 722, 723 (1991).

Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit. On appeal, petitioner instituted a pattern of delay, filing a motion for an extension of time on the day her brief was due, filing the mandatory joint appendix late, and moving to continue oral argument. These dilatory tactics coincided with petitioner's unsuccessful attempt to have the court of appeals simply put off consideration of her appeal pending possible adoption of a proposed amendment to Rule 15(c).

On October 31, 1991, the court of appeals affirmed. In an opinion which was not recommended for publication, the court of appeals adopted by reference the district court's opinions quashing service and denying leave to amend. Petitioner then filed a timely Petition for Rehearing.

On December 1, 1991, amendments to Rule 15(c) of the Federal Rules of Civil Procedure became effective. The amendment, intended to change the rule of *Schiavone*, permits relation back if the newly added defendant receives notice within the statute of limitations or the period provided for service by Rule 4. In addition, the amended rule permits application of state law to relation back issues in diversity cases. In her Petition for Rehearing, petitioner abandoned her arguments with respect to the proposed amendment. Moreover, after the amendment became effective, petitioner did not revive her argument. On December 4, 1991, the court of appeals denied the Petition for Rehearing. On March 4, 1992, petitioner filed a timely Petition for a Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

Having failed to name a proper defendant within the statute of limitations, petitioner now asks the Court to fashion for her a fact based exception to settled law. To do so, the Court would have to reweigh facts considered by the lower courts, re-evaluate the merits of a prior decision that has been overruled by act of Congress, or consider arguments which petitioner failed to raise and preserve below. Petitioner's request for a nonprecedential decision, tailored to her alone, presents no valid basis for an exercise of this Court's certiorari jurisdiction.

Petitioner does not contend that the court of appeals' decision conflicts with the decisions of this Court or any other court of appeals. Nor does she claim a departure from the accepted and usual course of judicial proceedings. The petition also does not present any important federal question which requires this Court's attention. Since amended Rule 15(c) obviates *Schiavone's* applicability, further consideration of the opinion in that case would be purely academic. Moreover, petitioner's asserted choice of law claim was waived below, and so not properly reviewable. Finally, the court of appeals' decision does not present any question relating to the standard for application of the new procedural rules to pending cases. Accordingly, further consideration by this Court will serve no constructive purpose.

I.

NO IMPORTANT FEDERAL QUESTION REQUIRING THE COURT'S ATTENTION ARISES WHEN THE COURT OF APPEALS SUMMARILY AFFIRMS THE DISMISSAL OF A CLAIM AGAINST A WHOLLY OWNED OPERATING DIVISION WHICH IS ADMITTEDLY NOT A LEGAL ENTITY CAPABLE OF BEING A DEFENDANT

Petitioner first challenges the dismissal of her claim against "Inland," a claim which concededly lacked a legally cognizable defendant. Invoking Rule 1 of the Federal Rules of Civil Procedure, petitioner asks the Court to "rectify this injustice." (Pet. at 10). In the alternative, petitioner asks the Court to wade into the substance of Ohio's common law of estoppel and consider factual contentions rejected by the lower courts. This is not a request to clarify an important question of federal law, but an attempt to muddy still waters of settled law with a fact-based exception.

Throughout the proceedings below, and before this Court, petitioner has not disputed that "Inland" is merely an operating division of GM and is not a legal entity capable of being sued. Likewise, petitioner does not challenge the axiom that an action must be brought against a defendant with capacity. *See, e.g., Baker's Aid v. Hussmann Food Service Co.*, 830 F.2d 13, 14 n.1 (2d Cir. 1987) (noting that a division of a corporation is not a legal entity). The only artificial entities subject to suit under Ohio law are corporations and partnerships. *See Group of Tenants from Grandview Homes v. Mar-len Realty, Inc.*, 40 Ohio App. 2d 449, 450, 321 N.E.2d 241, 242 (1974). Although petitioner claims that enforcement of legal capacity rules has led to

a harsh result in this case (Pet. at 6-7,10), she presents no unsettled question of law.

Instead, petitioner asks the Court to apply the doctrine of equitable estoppel to shift the burden of her error to GM. As the courts below recognized, this request is baseless. First, petitioner's characterization of the equitable estoppel doctrine is wrong: petitioner contends that GM is estopped from asserting its jurisdictional defenses because it "could have informed petitioner that its legally correct designation was 'General Motors Corporation.' " (Pet. at 8). But, as the dearth of authority in the petition underscores, the law in Ohio imposes no such affirmative duty upon a potential defendant.

Second, GM's "conduct during the state and federal proceedings," of which petitioner complains, cannot constitute a waiver of its defenses. GM continuously appeared "specially," although such caution is no longer required under modern rules of procedure. *See, e.g., Haile v. Henderson Nat'l. Bank*, 657 F.2d 816, 820 n.4 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982). The district court expressly found that GM did not appear in such a manner to waive its jurisdictional defenses (Pet. App. C). Even without the designation of special appearance, a motion for an extension of time, a petition for removal, and a Rule 12(b) motion do not, as a matter of law, constitute a waiver of jurisdictional defenses. *See Haile*, 657 F.2d at 820 n.4; *Flowers v. Aetna Casualty & Sur. Co.*, 163 F.2d 411, 415 (6th Cir. 1947) (petition for removal); *D'Amico v. Treat*, 379 F. Supp. 1004, 1007-08 (N.D. Ill. 1974) (motion for extension of time in which to move, answer or otherwise plead), *aff'd*, 510 F.2d 976 (7th Cir. 1975).

More fundamentally, however, GM's purported failure to advise petitioner during proceedings in the courts below that an operating division does not have the legal capacity to be sued under Ohio law could not have harmed petitioner – by the time GM was served, the statute of limitations had expired and it was already too late to save the Complaint.

While petitioner urges the Court to grant a writ of certiorari to "rectify this injustice and reaffirm the intent of the Civil Rules" (Pet. at 10), in reality petitioner is asking the Court to assume jurisdiction to relieve her of an obligation borne by all plaintiffs: the obligation to find and name a proper party-defendant. As the district court and the court of appeals properly required petitioner to meet that minimum obligation, no issue worthy of the Court's review is presented.

II.

THERE IS NO REASON FOR THE COURT TO REVISIT ITS DECISION IN *SCHIAVONE* AS THE 1991 AMENDMENTS OVERRULE ITS PRECEDENT

In her second proffered reason in support of issuance of a writ of certiorari, petitioner invites the Court to revisit its interpretation of Rule 15(c) in *Schiavone*. The 1991 amendments to Rule 15, however, terminated *Schiavone*'s precedential value. Further consideration of the issue by this Court will serve no precedential or instructive end.

Until the December 1991 amendments to Rule 15(c), the law of relation back was clear. When the district court and court of appeals rendered their decisions, Rule 15(c)

permitted an amendment which added a new defendant to relate back to the filing of the original complaint only if the party to be added had adequate notice "within the period provided by law for commencing the action." In *Schiavone*, this Court interpreted the Rule's "period provided by law" language as meaning the statute of limitations period only. Unless the putative defendant was served (or otherwise received notice of the action) within the statute of limitations, the amendment would be time-barred.

Petitioner asserts that "[b]y granting the Writ, this Court can reexamine the premise of *Schiavone* and its continued vitality in light of recent amendments to Rule 15(c)." (Pet. at 11). Because the amendments expressly extinguish the "vitality" of *Schiavone*, there is no need for reexamination by this Court. The advisory committee notes for the 1991 amendment to Rule 15(c) state the rule "has been revised to change the result in *Schiavone v. Fortune, supra*, with respect to the problem of a misnamed defendant." Fed. R. Civ. P. 15(c) advisory committee's note (1991 amendment). By legislatively overruling the case, the amendment makes *Schiavone* no more than a historical footnote to federal procedural law, unworthy of this Court's further review.

Even if the Court chose to consider petitioner's *Schiavone* argument, the record would reveal that the lower courts properly applied the then-existing precedent to this case. The facts of *Schiavone* are strikingly similar to the case at bar. The plaintiff in *Schiavone*, like petitioner, mistakenly sued an operating division (Fortune Magazine) instead of the intended defendant (Time, Inc.), on the eve of the expiration of the statute of limitations

period. 477 U.S. at 22-23. Time, like GM, was served outside the limitations period. The Court rejected the plaintiff's argument that Rule 15(c)'s "period provided by law for commencing the action" included the 120 days provided for service by Rule 4. *Id.* As Time received no notice within the statute of limitations, Schiavone's amended complaint was barred by the statute of limitations. *Id.* The same must be true of petitioner's amended complaint.

Petitioner insists that *Schiavone* is distinguishable because her Amended Complaint would simply "correct a misnomer," not change the party defendant. (Pet. at 14). Thus, she contends Rule 15(c) does not apply. As a matter of law, however, an amendment to add a proper defendant, after dismissal of a non-legally recognizable entity, is an amendment "changing" the defendant. The advisory committee note to Rule 15(c) indicates its applicability to "amendment of a pleading changing the party against whom a claim is asserted (*including an amendment to correct a misnomer or misdescription of a defendant*)." Fed. R. Civ. P. 15(c) advisory committee's note (1966 amendment) (emphasis added). Further, even courts accepting this distinction distinguish a true "misnomer" from a case such as petitioner's: "unlike *Schiavone*, this is not a case where the plaintiff has named as a party an entity without the capacity to sue or be sued." *Dandrea v. Malsbary Mfg. Co.*, 839 F.2d 163, 167 (3d Cir. 1988). Petitioner's Amended Complaint was an attempt to add a new defendant, and falls plainly within the rubric of Rule 15.

Petitioner asks the Court to reconsider *Schiavone* in light of its sometimes severe consequences. Congress has already taken up this challenge. Because Rule 15 has been

amended, further review of the prior law would resolve only an arcane question of procedure with no future significance. *Schiavone* presents no issue meriting further review by this Court.

III.

THE COURT SHOULD NOT CONSIDER A CHOICE OF LAW ARGUMENT NOT PRESERVED BELOW

In the third assignment of error presented in support of a writ of certiorari, petitioner argues that Ohio law, rather than the Federal Rules of Civil Procedure, applies to permit her Amended Complaint to relate back. As petitioner did not challenge the application of federal law, and indeed urged consideration of federal precedent in the district court, petitioner's argument should not be considered by this Court.

Failure to dispute the law applied in the trial court precludes a party from raising the issue on appeal. This maxim is universally applied in the courts of appeals. *E.g., Reflectone, Inc. v. Farrand Optical Co.*, 862 F.2d 841, 844 (11th Cir. 1989); *Michigan Chem. Corp. v. American Home Assurance Co.*, 728 F.2d 374, 377 (6th Cir. 1984); *Michael-Regan Co. v. Lindell*, 527 F.2d 653, 565 (9th Cir. 1975).

In this case, petitioner waived her choice of law argument by not raising it in the district court. The Motion To Amend cited only federal authority. Petitioner's Reply Memorandum was predicated upon the "spirit and letter" of the *federal* rules. In her "Second Supplement [sic] Memo In Support Of Motion For Amendment To Complaint Citing Additional Legal

Authority" petitioner urged consideration of an unreported case from an Ohio court of common pleas, but that case, *Thompson v. Aivars Vitols, Inc.*, No. 87-2027, slip. op. (Montgomery Cty. C.P. Oct. 25, 1989), was decided with much deference to *federal* authority. Indeed, petitioner declared (erroneously) that Ohio Rule 15(c) is "an exact duplicate of the Federal Rule" and urged that the "Federal Court authorities cited [in *Thompson*] are likewise applicable here."

Further, *Schiavone* corroborates that the court of appeals properly refused to consider petitioner's Ohio procedure argument. The Court of Appeals for the Third Circuit had rejected Schiavone's claim that New Jersey law, rather than Federal Rule 15, applied; the plaintiff had not raised the issue in the district court. *Schiavone v. Fortune*, 750 F.2d 15, 18-19 (3d Cir. 1984), *aff'd*, 477 U.S. 21 (1986). This Court applied federal law, without discussion, and affirmed. 477 U.S. at 27, 29-32.

In any event, the amendment to Rule 15 obviates the need for this Court to address the choice of law question in relation-back cases. As amended, Rule 15(c) provides, in pertinent part,

> An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by law that provides the statute of limitations.

Thus, the amended Rule directs federal courts to apply the state law standard for relation back in diversity cases.

Petitioner's state law argument is of historical significance only, and no use would be served by this Court's further review.

IV.

APPLICATION OF AMENDED RULE 15(c) TO THIS CASE WOULD RESULT IN MANIFEST INJUSTICE

Finally, petitioner asks the Court to grant certiorari to consider retroactive application of amended Rule 15(c). (Pet. at 21-22). Petitioner failed to ask the court of appeals to apply the amendment, once it was effective. Further, as there is no reason to believe that the courts of appeals will fail to properly apply the amendment, when presented with an opportunity to do so, this case does not warrant exercise of the Court's supervisory jurisdiction.

While the case was being briefed and argued, the proposed amendments to the Federal Rules of Civil Procedure were pending, and their ratification and/or retroactivity were still uncertain. In her appellate brief, petitioner asked the court of appeals to stay its consideration of her appeal, pending resolution of the uncertainty over the proposed amendments. The court of appeals declined, and decided the case under the terms of the then-effective rule.

Significantly, petitioner's Petition for Rehearing made no mention of the proposed amendments. That petition was pending before the Sixth Circuit on December 1, 1991, when amended Rule 15(c) took effect. Still, petitioner did nothing to ask the court of appeals to apply the new rule. On December 4, 1991, the court of appeals denied the Petition for Rehearing.

Petitioner thus never requested application of the amended rule after its effective date. Had she done so, the court of appeals would have determined if a retroactive application would have been "just and practicable" in this case.

The language of this Court's order relating to the 1991 amendments to the federal rules is discretionary, not mandatory. *See* Order (Pet. Ex. F) (the amendment applies to pending cases "insofar as is just and practicable"); *see, e.g., Johnson v. United States*, 414 F.2d 807 (9th Cir. 1969); *Preston v. Aetna Life Ins. Co.*, 174 F.2d 10, 12 (7th Cir.), *cert. denied*, 338 U.S. 829 (1949). Thus, in many cases, courts have properly declined to apply amendments to the Federal Rules of Civil Procedure retroactively. *See, e.g., Pantry Queen Foods v. Lifshultz Fast Freight*, 809 F.2d 451, 454 (7th Cir. 1987); *Hashemi v. Campaigner Publications, Inc.*, 784 F.2d 1581, 1583-84 (11th Cir. 1986) (refusing to apply amended rule to pleadings filed before amendment); *In re Brandstaetter*, 767 F.2d 324, 327 (7th Cir. 1985).

Petitioner declined to invite the court of appeals to make this determination. There is no reason for this Court to step in, and give petitioner what she apparently forgot to ask for from the court of appeals. Although petitioner claims the Court can "establish the retroactivity of Rule 15(c)" (Pet. at 22), the standard for retroactivity of new precedential rules under this Court's transmittal orders is, in fact, firmly established. There is simply no reason to believe that the court of appeals needs further instruction on this principle, and thus no need to consider application of the amended rule to this case.

In any event, petitioner's inattentiveness to legal formalities at each step of this litigation makes her less than deserving of extraordinary relief in a case that otherwise presents no question of legal importance. Due to her failure to present or preserve the issue of retroactivity, combined with her dilatory tactics throughout the appeal, it is neither just nor practicable to retroactively apply the amendment to her claims. As the First Circuit has noted, delay caused by a petitioner on appeal militates against a retroactive application of Rule 15(c):

> [W]e would likely have concluded appellate review of this case and affirmed the district court before the effective date of the new rule if the plaintiff had presented his arguments, all of them weak, in a more forthright manner . . . [P]laintiff has delayed the decision in this case, and that fact should not entitle him to an otherwise unattainable windfall due to changes in a procedural rule.

Freund v. Fleetwood Enter., Inc., 956 F.2d 354, 363 (1st Cir. 1992). Likewise, petitioner's actions in this case do not entitle her to the amendment's "windfall," an excuse from the law in effect throughout this litigation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

WANDA MAE BINGHAM,	:	CASE NO.
Petitioner,	:	
	:	NOTICE OF
v.	:	SPECIAL
INLAND DIVISION OF GENERAL MOTORS,	:	APPEARANCE
	:	
Respondent.	:	

John M. Kunst, Jr., Member of the Bar of this Court and Counsel of Record for General Motors Corporation, hereby enters a special appearance on behalf of Respondent, which was erroneously named in the Petition for a Writ of Certiorari, as "Inland Division of General Motors" and was erroneously named in the Complaint as "Inland Division, GM Corp."

Respectfully submitted,

/s/ John M. Kunst, Jr.
JOHN M. KUNST, JR.
DINSMORE & SHOHL
Counsel of Record
SUSAN J. LUKEN
Attorneys for General Motors Corporation
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8214

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing has been served on Dwight D. Brannon, Brannon, Gianuglou, Dankof & Caras, Six South Patterson Boulevard, Suite 300, Dayton, Ohio 45402, Attorney for Petitioner, by regular and certified U. S. mail, this 18 day of March, 1992.

/s/ John M. Kunst, Jr.

RULE 29.1 LIST OF NON-WHOLLY OWNED SUBSIDIARIES OF GENERAL MOTORS CORPORATION

AC Bakony Kft. (Hungary)

AMBRAKE Corporation (USA)

AMRAAM International Licensing Company (USA)

American Manufacturing Systems, Inc. (USA)

Asset Leasing GmbH (West Germany)

Atlantic Satellites Ltd. (Ireland)

Aura Srl (Italy)

Banque de Credit General Motors (France)

Beijing International Information Processing Company Limited (Peoples Republic of China)

British Caledonian Flight Training Limited (England)

CAMI Automotive, Inc. (Canada)

Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG (West Germany)

Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 40 KG (West Germany)

China Management Systems Corporation (China)

Comlinear Corporation (USA)

Convesco Vehicles Sales GmbH (West Germany)

DRB s.a./n.v. (Belgium)

Daewoo Automotive Components, Ltd. (Korea)

Daewoo Motor Co., Ltd. (Korea)

Delkor Battery Company, Ltd. (Korea)

Diavia SpA (Italy)

EPEC S.A. (Brazil)

Earth Observation Satellite Company (USA)

Emperion Corporation (USA)

Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)

Federal Computer Services Corp. (USA)

Federal Integrated Systems Corporation (USA)

G & F Company (USA)

GM Allison Japan Limited (Japan)

G.M.A.C. Financiera de Colombia S.A. Compania de Financiamiento Comercial (Colombia)

GMFanuc Robotics Canada Ltd. (Canada)

GMFanuc Robotics Corporation (USA)

GMFanuc Robotics Europe GmbH (West Germany)

GMFanuc Robotics Italia S.r.l. (Italy)

GMFanuc Robotics (U.K.) Ltd. (England)

GMFanuc Robotique France S.A.R.L. (France)

General Motors Bankgesellschaft m.b.H. (Austria)

General Motors del Ecuador S.A. (Ecuador)

General Motors France Automobiles S.A. (France)

H & D Radio Frequency Identification Products (USA)

H & R Company (USA)

HBC (USA)

HKV (USA)

Hughes-Kenwood RDSS, Inc. (USA)

IBC Vehicles Limited (United Kingdom)

I.K. Coach Co., Limited (Japan)

ITC Inland Teknik Oto Yan Sanayi Sirketi (Turkey)

International Electro-Optical Industry Anonim Sirketi (Turkey)

Interpractice Systems, Inc. (USA)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Koram Plastics Company, Ltd. (Korea)

LEA GP Incorporated (USA)

Light Helicopter Turbine Engine Company (USA)

MET (USA)

Metal Casting Technology, Inc. (USA)

Millbrook Pension Management Ltd. (England)

Neodata Holdings, Inc. (USA)

New United Motor Manufacturing, Inc. (USA)

Nippon EDS Co., Ltd. (Japan)

Opel-Automobilwerk Eisenach-PKW GmbH (West Germany)

Opel-Wohnbau GmbH (West Germany)

Packard CTA Pty. Ltd. (Australia)

Packard Electric Vas kft (Hungary)

Saab Automobile AB (Sweden)

Shinsung Packard Company, Ltd. (Korea)

Societe Francaise des Amortisseurs de Carbon S.A. (France)

Sung San Company, Ltd. (Korea)

Systems Technology Management Corporation (Korea)

T.A.D. Communications Company (USA)

3DK Limited (United Kingdom)

Truck and Bus Engineering U.K., Limited (USA)

United Australian Automotive Industries Limited (Australia)

Vanguarda Componentes Automotivas, S.A. (Brazil)

Vehicle Test Technology, Inc. (USA)